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Supreme Court and Supreme Law (Book Review)

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of action are included, with a ready reference to cases dealing with the particular subject which may be examined in order to verify the accuracy or sufficiency of the form.

As its title implies, however, the volume does not attempt to show the young lawyer how to try the entire case nor does it undertake to answer all of the legal questions which will arise in every case. It is frankly recognized that to do so would be impossible and that additional problems will be presented by the facts of each case which would be impossible to anticipate or deal with in a single volume. On the contrary, the function of this work is to set forth the *minimum requirements* of proof necessary to enable the plaintiff's attorney to present a case which will withstand the defendant's motion to dismiss at the close of the plaintiff's proof upon the ground that the plaintiff has failed to establish a *prima facie* case. Whether additional proof will be necessary to entitle the plaintiff to judgment at the end of the entire case obviously will depend upon the facts and circumstances of the individual case.

The book well serves the purposes for which it has been produced. The newly admitted trial lawyer by resort to it will find his burden considerably lessened and his path made smoother. The more experienced lawyer will find in it a wealth of reference material to aid him in his research as well as a ready review of the essential elements of the common causes of action.

Essentially, this volume is a form book and not a treatise. But it represents a vast amount of research on the part of the authors and a fundamental knowledge of the substantive law. It can be put to good practical use especially by the neophyte who must however be cautioned not to expect too much. Generally, only half of his work is done when he proves a bare *prima facie* case. This book will not help him when more than that is required.

ROBERT L. CALLAHAN.*



SUPREME COURT AND SUPREME LAW. Edited by Edmond Cahn. Bloomington: Indiana University Press, 1954. Pp. ix, 250. \$4.00.

The sesquicentennial of *Marbury v. Madison*,¹ furnishes meet occasion for these eleven essays,² each discussed by all of the contributors, we are told, "quite spontaneously," and the discussions printed as "recorded by a stenotypist, the speakers having been afforded no opportunity to polish or revise their remarks."

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¹ 1 Cranch 137 (U.S. 1803).

² Status to Challenge Constitutionality (Ralph F. Bischoff); Political Questions (John P. Frank); Review of Facts in Constitutional Cases (Paul A. Freund); The Role of History (Willard Hurst); The Role of the Constitu-

Perhaps the *Marbury* case offers the most important single opinion in American law. Curiously enough, it is also the most believe-it-or-not case. Today the Supreme Court has no file and no papers relating to this leading case in constitutional law, other than an entry on its docket, indications that hearings were held and a notation on the rule to show cause, "discharged the Court not having jurisdiction to issue a Mandamus in this case." William Cranch, an assistant judge of the District of Columbia Circuit Court, for some reason, chose this case from the February Term, 1803, to be the first on which to take notes and make full report. Almost nothing would have survived but for these notes and some informal newspaper accounts (considering the case a victory for a newly installed Democratic executive branch of government over a solidly Federalist bench that retreated from ordering delivery of Federalist President Adams' commissions as justices of the peace for faithful Federalists).

Other remarkable things surround the case. Why did not the Chief Justice disqualify himself? When Chief Justice Ellsworth resigned (he had been doubling as minister to France) and the first Chief Justice, Jay, declined redesignation, Adams named his Secretary of State. Marshall was confirmed by the Senate on January 27, 1801, entered upon his duties as Chief Justice on February 4, but nevertheless continued as Secretary of State until the final hour on March 3, 1801. It was Marshall then who sealed the commissions, signed by Adams, of the 42 justices of the peace. It was Marshall's brother, James, who delivered some but not all of the commissions. Marbury and three others were among those whose commissions had been sealed by Marshall and not delivered by his brother. Yet an affidavit from brother James was read in testimony before the Court relating to the signing, sealing and failure to deliver the commissions. And the Chief Justice himself, as Secretary of State, had written his brother that he believed these appointments were complete when he had affixed the Seal of the United States and that delivery was not essential. This was precisely one of Marshall's conclusions in his opinion as Chief Justice. Equally extraordinary was the participation of Mr. Justice Paterson in the opinion: as Senator from New Jersey he had assisted Senator (and later Chief Justice) Ellsworth on the Judiciary Committee in drafting Section 13 of the Judicature Act of 1789 that he now was holding unconstitutional. The opinion itself deviates sharply from subsequent enunciations by the Court about judicial self-restraint in avoiding a constitutional question if the matter can be disposed of by statutory interpretation, a course glaringly apparent in the *Marbury* case. It may too have been, as Jefferson observed later, that the Court had decided a moot case: Marbury's and his fellow litigants' five-year terms were nearly half expired by the time the matter had been reached for decision, and the new President had appointed others in their places.

tional Text (Charles P. Curtis); The Role of Official Precedents (Ralph F. Bischoff); Review and Federalism (Paul A. Freund); Review and Basic Liberties (John P. Frank); Review and the Distribution of National Powers (Willard Hurst); Review and Majority Rule (Charles P. Curtis); An American Contribution (Edmond Cahn).

Although the occasion for this exchange of views, the *Marbury* case is referred to little more than half-dozen times in the eleven essays and interspersed discussions. The Editor's essay provides an historical and philosophical treatise on the origins and nature of judicial review. The American contribution, stemming from the *Marbury* case, consisted of providing as flexible and dynamic a constitutional framework with a written instrument as the British have attained with an unwritten constitution. Perhaps the Editor takes some unwarranted liberty in referring to "those of us who are not fond of Marshall's personality or his politics." In any event, he poses the question for his five essayists: "What practical, working differences does judicial review make in the contemporary American scene?"

It is doubtful if such question could be answered in a "spontaneous" discussion or eleven short papers. It is not answered more than speculatively by the contributors to this volume. What each of them has achieved, however, is an interesting, high-level criticism of current constitutional doctrines of the Court. Dean Bischoff, in one essay, criticizes as excessive the Court's requirement of standing for a litigant to obtain review in cases involving liberty of opinion.³ In another, the same writer mildly regrets that "*stare decisis* and the processes of adjudication have too often played a secondary role or have been a mere means to an end." The numerous cases⁴ in which decisions of a divided Court have been overturned for little better reason than intervening change of personnel indicate how understated and singular among these contributors is such criticism.

In the third essay, Professor Freund suggests that the technique of weighing factual interests in cases involving state regulation of interstate commerce⁵ be adapted to liberty of opinion situations. In a later and longer commentary on federalism, Professor Freund believes that Congress could go further still toward a centralized unitary government by legislation under the Full Faith and Credit clause and by coercing states to accept uniform federal rule in areas reserved to states, through the scheme of a federal tax credited in full to compliant states. This device has been familiarly employed in unemployment insurance⁶ and agricultural benefit programs.⁷ The logical extension of such regulation, in the guise of Congress' virtually unlimited power to tax, might obliterate local government and currently foreshadows federal control of education, marriage and divorce.

Professor Hurst believes that "political, economic, and social history of the United States is legally competent and relevant evidence for the interpretation of the Constitution." But, in the last essay, Mr. Curtis makes a strong plea for what he calls "immanent laws" and criticizes "... looking at

³ See *Adler v. Board of Education*, 342 U.S. 485 (1952); *Doremus v. Board of Education*, 342 U.S. 429 (1952); *Zorach v. Clauson*, 343 U.S. 306 (1952).

⁴ Compare *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), with *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). Compare *In re Disbarment of Isserman*, 348 U.S. 1 (1954), with *In re Disbarment of Isserman*, 345 U.S. 286 (1953).

⁵ See, e.g., *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

⁶ See, e.g., *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

⁷ See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

the Bill of Rights as in a mirror which reflects our current political morals."⁸ The most controversial sentiments, however, are those of Professor Frank. He first castigates the Court for what he considers over-expansion of the "political question" doctrine by which determinations of an executive and legislative nature are escaped as non-justiciable.⁹ Yet in his essay on basic liberties, Professor Frank exceeds the dissents of Justices Black and Douglas in remorse at what the Court has done when it has chosen to act. "... [T]here is not a single case of real consequence in which, in 160 years, judicial review has buttressed liberty."¹⁰ One may question as contradictory the advocacy of expansion of the judicial function into political areas, on one hand, and the severity of criticism of the exercise of the same function with respect to basic liberties, on the other. Professor Frank suggests all-out abolition of the presumption of constitutionality in civil liberty cases and the substitution of a presumption of unconstitutionality, a brand new free speech test to replace the "clear and present danger" one, and a fresh attitude that deportation and denaturalization cases should be regarded as criminal ones. In criminal matters, Professor Frank urges that "definition of criminal punishment should be thoroughly revised." In this connection he resists non-interference by the Court with admissibility by states of evidence procured by unlawful seizures.¹¹ Professor Frank laments abandonment¹² by the Courts of the view¹³ that the Fourth Amendment requires a search warrant whenever it would be practicable for federal officers to obtain one. As a practical protection against invasion of privacy, a search warrant that issues with blind automaticity by a United States Commissioner hardly offers the safeguard supposed by Professor Frank.

The observations of the closing essay by a practicing lawyer, Mr. Curtis, offers some consolation:

What Marshall did was not simply to give the Court the function of declaring void and ignoring the acts and statutes of our imposed order which violated our Constitution. This was the least consequence of *Marbury v. Madison*. He opened the way for the Court to take upon itself the function of interpreting and declaring our immemorial immanent law.¹⁴

On the whole the papers and discussions, and the theses they expound and defend, are brilliantly presented, and make the volume a worthwhile acquisition for students and lawyers in the constitutional area.

FREDERICK J. LUDWIG.*

⁸ P. 183.

⁹ *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *Colegrove v. Green*, 328 U.S. 549 (1946).

¹⁰ P. 111.

¹¹ See, e.g., *Wolf v. Colorado*, 338 U.S. 25 (1949).

¹² See *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950).

¹³ See *Trupiano v. United States*, 334 U.S. 699 (1948).

¹⁴ P. 192.

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